

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PROTECT DEMOCRACY PROJECT, INC.,
BRENNAN CENTER FOR JUSTICE AT
NEW YORK UNIVERSITY SCHOOL OF
LAW, MICHAEL F. CROWLEY, AND
BENJAMIN WITTES,

Plaintiffs,

v.

U.S. DEPARTMENT OF JUSTICE, U.S.
DEPARTMENT OF HOMELAND
SECURITY, WILLIAM PELHAM BARR in
His Official Capacity as Attorney General of
the United States, and KEVIN K.
MCALEENAN in his Official Capacity as
Acting Secretary of the Department of
Homeland Security,

Defendants.

Case No. 1:18-cv-10874-DPW

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS THE AMENDED COMPLAINT**

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INTRODUCTION

Congress has rightly decided that a functioning democracy requires the federal bureaucracy to be truthful when it speaks to the public. Defendants—the Department of Justice (“DOJ”) and the Department of Homeland Security (“DHS”) (together, the “Agencies”)—left truth by the wayside when they published *Executive Order 13780: Protecting the Nation from Foreign Terrorist Entry into the United States, Initial Section 11 Report* (the “Report”). The Report purports to soberly deliver factual and statistical information about foreign nationals convicted of certain crimes in the United States. In reality, the Report falsely portrays immigrants as the primary perpetrators of terrorism and other crimes. As a communication of factual information, the Report implicates the congressionally-mandated requirements of the Information Quality Act (“IQA”)—and fails them completely.

The Agencies ignored internal warnings about the doubtful quality of their sources in preparing the Report, and the result is rife with distortions and outright inaccuracies. Analysis by the nonpartisan Government Accountability Office (“GAO”) has revealed that the Report inflates the incidence of terrorism committed by those not born in the United States by a factor of three, even before accounting for the fact (ignored in the Report) that most incidents of terrorism in the United States have been committed by citizens of this country. The Report is so egregiously misleading, in fact, that in the face of Plaintiffs’ challenge the Agencies took the rare step of admitting error.

The Report remains publicly available on the Agencies’ websites, however—uncorrected. Instead of bringing the Report into compliance with the congressionally-mandated information quality standards of “quality, objectivity, utility, and integrity,” Pub. L. 106-554 § 515(a), (b), 114 Stat. 2763A-153–54 (Dec. 21, 2000), *codified at* 44 U.S.C. § 3516 note, the Agencies have merely offered vague promises to do better in the future. The IQA requires more: the Act

imposes procedural standards as well as substantive ones, and demands that the Agencies resolve Plaintiffs' request for correction in a manner "appropriate for the nature and timeliness of the information involved." 67 Fed. Reg. 8,458 (Feb. 22, 2002). The refusal to correct a false and misleading Report being used in a live policy debate does not meet that standard.

The Agencies' actions under the IQA are, like any other agency action, subject to judicial review under the APA. It is therefore a non sequitur for the Agencies to argue, as they do, that the IQA does not itself create a private right of action. Section 706 ordains judicial review in the usual way. Here, that means the Court should evaluate under § 706(2) whether the Agencies acted improperly in determining that the Report complies with the IQA and does not warrant correction. The Agencies are equally wrong in asserting that Plaintiffs lack standing to bring this APA claim. Plaintiffs are indisputably "affected persons" under the IQA, with a legal right to "obtain correction," who have been denied the procedural remedy afforded by statute. Plaintiffs have adequately pleaded both informational and procedural standing.

The Report is propaganda masquerading as fact. To paraphrase the well-known adage, agencies are entitled to their own opinions (and policy preferences), but not to their own facts. Congress codified this common-sense principle in the IQA, and courts may enforce it through the APA. This Court should respect Congress's instructions and deny the motion to dismiss.

BACKGROUND

I. Factual Background

A week after taking office, President Donald Trump promulgated Executive Order 13769, *Protecting the Nation from Foreign Terrorist Entry into the United States* ("EO-1"), which followed through on a campaign promise by imposing an immediate temporary ban on entry by nationals of several overwhelmingly Muslim countries and all refugees. *See generally* 82 Fed. Reg. 8,977 (Jan. 27, 2017); Amended Complaint ¶ 40 (Dkt. 36) ("AC"). Courts quickly

enjoined EO-1; rather than defend it, the President tried again, issuing Executive Order 13780, similarly called *Protecting the Nation from Foreign Terrorist Entry into the United States*, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (“EO-2”). AC ¶ 49. EO-2 made minor changes to the immigration provisions of EO-1 while continuing its bans on entry. EO-2 § 2.

In a purported attempt to be “more transparent with the American people,” and to “more effectively implement policies and practices that serve the national interest,” Section 11 of EO-2 required DHS, in consultation with DOJ, to “make publicly available” several categories of data:

- i. “foreign nationals in the United States” charged, convicted of, or removed from the United States based on “terrorism-related offenses”;
- ii. “foreign nationals in the United States radicalized after entry” who either engaged in terrorism or provided material support for terrorist organizations;
- iii. “acts of gender-based violence against women, including honor killings”; and
- iv. “any other information relevant to public safety and security,” including the immigration status of foreign nationals “charged with major offenses.”

AC ¶¶ 42, 49; EO-2 § 11.

At the time, the FBI had already collected some of this data by comparing its own investigation files with a list prepared by DOJ concerning certain international terrorism-related offenses between September 11, 2001 and December 31, 2016. AC ¶¶ 44-47. The FBI concluded that 392 or 393 of the 553 persons on DOJ’s list were born abroad. *Id.* ¶¶ 44, 46. President Trump seemingly referenced this work when asserting in an address to Congress that, per DOJ data, “the vast majority of individuals convicted of terrorism and terrorism-related offenses since 9/11 came here from outside of our country.” *Id.* ¶ 47.

On its face, the President’s statement to Congress was false: the majority of terrorist acts

(and convictions) in the United States are acts of domestic terrorism committed by persons born in the United States. *See* AC ¶ 75. But even if the President meant to reference *international* terrorism—*viz.*, terrorism that “transcend[s] national boundaries,” 18 U.S.C. § 2331(1)—his statement still was badly misleading. DOJ’s National Security Division included a preambular warning that the DOJ list included anyone *charged* with a terrorism-related offense “regardless of the offense of conviction,” and that it also included dozens of individuals prosecuted in investigations following 9/11 “regardless of whether investigators developed or identified evidence that they had any connection to international terrorism.” *Id.* ¶ 44. And per the then-Chief of Staff to the FBI Director, the FBI’s own list “likely contains gaps or errors” because “database checks are limited in their ability to accurately identify a date/place of birth.” *Id.* ¶ 46.

EO-2’s September 12, 2017 deadline for the Section 11 report came and went with no publication. AC ¶ 52; *see also* EO-2 §§ 11, 14. Media reports suggest that around that time and behind the scenes, a senior DOJ official rejected an FBI report finding that refugees did *not* present a significant threat to the United States on the basis that the Attorney General “doesn’t agree with the conclusions.” AC ¶ 51. Eventually, however, as the Administration renewed efforts to pass stricter immigration laws, Defendants published the Report, on January 16, 2018. *See* AC Ex. 1. The Report purports to supply the data for the canard that immigrants are primarily responsible for terrorism in the United States.

The Report’s principal conclusion is that 402 of 549 people (roughly 73%) convicted of international terrorism-related charges from September 11, 2001 through December 31, 2016 were “foreign-born.” AC ¶ 53. Report at 2. Of those 402 “foreign-born” individuals, the Report asserts, 148 were naturalized U.S. citizens and 254 were foreign nationals. *Id.* The Report provides detailed, supposedly “illustrative” descriptions of eight of the 402 individuals. *Id.* The

Report also estimates that 23 to 27 “honor killings” and 1,500 “forced marriages” occurred every year in the United States between September 11, 2001 and December 31, 2016. *Id.* Based on an outside study, it surmises that 91% of these honor killings occurred because the victim was perceived as “too Westernized.” *Id.*

The Report’s flaws are obvious. The Agencies cherry-pick information, present that information in a biased manner, and include outright substantive errors—advancing the Administration’s predetermined narrative that immigration is a threat to national security. The Report inflates the proportion of individuals in focus by excluding domestic terrorism convictions and reporting convictions of “foreign-born” individuals (instead of the “foreign nationals” called for by EO-2). (When the GAO did a similar analysis, it concluded that just 28% of those convicted of a terrorism-related offense were foreign nationals. AC ¶ 78.) The Report fails to provide the requisite context for the figures provided by omitting DOJ’s own caveats and by failing to release the underlying data. *Id.* ¶¶ 75, 84. The “illustrative examples” in the Report are not representative at all, but are instead handpicked to further the narrative that refugees are dangerous and to demonize certain pathways to immigration that are disfavored by this administration (i.e., family-based immigration and the visa lottery). *Id.* And the Report’s gender-based violence statistics are wrong, drawn from a “study” commissioned by an anti-Muslim critic that was described by its own author as “not terribly scientific.” *Id.* Because of these and other errors, the Report fails to provide the truthful and objective information that readers expect when the government publishes facts. *Id.*

II. The Information Quality Act

EO-2 required that the Report’s dissemination of information comply with all “applicable laws.” EO-2 § 11. One such law is the IQA, which Congress passed in 2000 as the last in a

series of expansions to the Paperwork Reduction Act (“PRA”).¹ *See* Pub. L. 106-554 § 515(a), 114 Stat. 2763, 2763A-72 (Dec. 21, 2000) *codified at* 44 U.S.C. § 3516 note.

In the latest iteration of the PRA, Congress explained its intent to improve the “quality” of information government agencies were disseminating, as well as its “public benefit” and “utility.” *See* Pub. L. 104-13 § 2, 109 Stat. 163, 163–64 (May 22, 1995) *codified at* 44 U.S.C. § 3501. Congress wanted agencies “responsib[le] and accountab[le] . . . to . . . the public for implementing the . . . information resources management . . . and related policies and guidelines established under” the PRA. *Id.* Congress built on this framework in the IQA. That Act directs OMB to exercise its rulemaking authority under the PRA to promulgate guidelines that “ensur[e] and maximiz[e] the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.” *See* Pub. L. 106-554 § 515(a). These guidelines “shall apply to the sharing by Federal agencies of . . . information disseminated by Federal agencies.” *Id.* And federal agencies must permit “affected persons to seek and obtain correction” of information “maintained and disseminated by the agency” that does not comply with OMB’s guidelines. Pub. L. 106-554 § 515(b)(1), (b)(2)(B).

OMB promulgated the requisite IQA guidelines, after notice and comment, on February 22, 2002. *See* Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8,452 (Feb. 22, 2002) (“OMB Guidelines”). The OMB Guidelines require that agencies examine any publicly disseminated information for compliance with the following three requirements:

¹ The Agencies characterize the IQA as a “note to the Consolidated Appropriations Act of 2001.” Mot. at 3. It is in fact section 515 of that Act. It is only a note in the United States *Code*—and codification decisions are made by the unelected Office of the Law Revision Counsel (ORLC), not Congress. *See United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) (“Where, as here, the ‘change of arrangement’ [of a law] was made by a codifier without the approval of Congress, it should be given no weight.”). As one commentator recently noted, “the OLRC regularly hides away in notes some of the most important text that Congress enacts.” Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. Chi. L. Rev. 1, 24 (2019).

- a. **Objectivity** - examining (i) whether the information's *presentation* is "accurate, clear, complete, and unbiased," with appropriate context, and (ii) whether the *substance* of the information is "accurate, reliable, and unbiased," including any statistics' underlying data. *Id.* at 8459.
- b. **Utility** - examining "uses of the information not only from the perspective of the agency but also from the perspective of the public." *Id.*
- c. **Integrity** - protecting access to information in order to ensure that it "is not compromised through corruption or falsification." *Id.* at 8460.

The Agencies, too, published their own IQA guidelines, which provided for agency adjudications of IQA petitions. DOJ Information Quality Guidelines (updated Aug. 6, 2019)²; DHS Information Quality Guidelines (Mar. 18, 2011).³

Earlier this year, OMB issued a memorandum chastising agencies for "fail[ing] to respond fully" to IQA challenges. *See* Russell T. Vought, Improving Implementation of the Information Quality Act M-19-15 (Apr. 24, 2019), at 1, 10 ("2019 OMB Memo").⁴ Reaffirming the principles in the Guidelines, OMB required agencies to update their IQA policies and clarified that IQA petition responses must "mak[e] clear . . . the data underlying the challenged information, the methodologies the agency used to analyze the data, the reasons for use of such methodologies, and any peer reviews addressing the agency's analysis." *Id.* at 10.

III. Procedural History

On February 8, 2018, Plaintiffs filed identical administrative petitions with DOJ and DHS under the Agencies' IQA guidelines (the "Petition") detailing how the Report fails to fulfill the

² <https://www.justice.gov/iqpr/information-quality>.

³ <https://www.dhs.gov/sites/default/files/publications/dhs-iq-guidelines-fy2011.pdf>.

⁴ <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf>

IQA’s objectivity, utility, and integrity standards under OMB’s Guidelines. Plaintiffs requested that the Agencies either retract the Report or make several specific corrections, including providing additional context. AC ¶¶ 69, 75-77.

The Agencies did not respond to the Petition, and so Plaintiffs filed this action seeking to enforce the Agencies’ legal obligation to respond. *See* Dkt. 1. On June 19, 2018—71 days after the Agencies’ deadline for responding—the Agencies informed Plaintiffs that they needed additional time to resolve the Petition. AC ¶¶ 79-80. The Agencies ultimately denied the Petition days before moving to dismiss this action. *Id.* ¶ 81. The Court stayed the case while Plaintiffs filed identical administrative appeals with each agency. *Id.* ¶ 83; Dkts. 19, 24, 27.

The Agencies denied Plaintiffs’ appeals in separate letters dated December 21, 2018, and February 14, 2019. AC ¶¶ 91, 93. The Agencies rejected some of Plaintiffs’ contentions and failed to respond to others, but made several notable concessions. The Agencies admitted outright that their gender-based violence data was wrong and promised that in future reports they would release the data underlying the Report’s key terrorism claims. They also promised that future reports would provide some of the requested context surrounding the conviction data and more varied “illustrative” examples. *Id.* ¶¶ 94-97. Despite these rare admissions, the Agencies affirmed their denial of the Petition and declined to change one word of the Report. *Id.* ¶ 95.

Plaintiffs filed an Amended Complaint challenging the Agencies’ denial of their Petition on March 29, 2019, Dkt. 36, and the Agencies moved to dismiss on July 12, 2019, Dkts. 38, 40 (“Mot.”).

ARGUMENT

I. Pleading Standard

When considering a motion to dismiss under Rule 12(b)(6), courts “accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences therefrom in the

plaintiffs favor and determine whether the complaint, so read, sets forth facts sufficient to justify recovery on any cognizable theory.” *People To End Homelessness, Inc. v. Develco Singles Apartments Assocs.*, 339 F.3d 1, 5 (1st Cir. 2003). The same is true for a motion to dismiss for lack of standing. *See Gustavsen v. Alcon Labs., Inc.*, 903 F.3d 1, 7 (1st Cir. 2018) (discussing “same plausibility standard”).

II. Plaintiffs Have Standing to Pursue This Action

Standing is “part of the case-or-controversy requirement of Article III.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs have adequately alleged all three constitutional requirements—injury in fact, causation, and redressability, *see id.* at 560–61—under both informational and procedural standing theories.

A. Plaintiffs Have Adequately Alleged Informational Standing

Under the doctrine of informational standing, a plaintiff “suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.” *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 21 (1998); *see also Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 449 (1989) (holding that failure to obtain information subject to disclosure “constitutes a sufficiently distinct injury to provide standing to sue”); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982) (informational standing to enforce the Federal Housing Act); *Am. Canoe Ass’n, Inc. v. City of Louisa Water & Sewer Comm’n*, 389 F.3d 536, 542 (6th Cir. 2004) (same under Clean Water Act). Because the IQA imposes an explicit disclosure requirement on the Agencies in response to petitions for correction, Plaintiffs have standing to challenge the Agencies’ refusal to comply with that obligation.

1. Plaintiffs have standing to challenge the Agencies’ refusal to disclose information in violation of a statutory right

The IQA grants “affected persons” the statutory right to, in an administrative proceeding,

“seek *and obtain* correction of information . . . disseminated by the agency that does not comply with” its standards. *See* Pub. L. 106-554 § 515(b)(2)(B) (emphasis added). The Agencies do not dispute that Plaintiffs are “affected persons” under the Agencies’ broad construction of the term, which includes anyone who “may use, benefit, or be harmed” by the Report. *See* DOJ Information Quality Guidelines; DHS Information Quality Guidelines at 9. Plaintiffs write about criminal justice, national security, terrorism, and/or immigration, all of which are impacted by the false claims in the Report. *See* AC ¶¶ 71-72, 74. The Brennan Center and Mr. Wittes have written about the Report specifically, meaning they unquestionably have “used” it. *See id.*

Despite the fact that Plaintiffs duly filed their Petition, the Agencies have withheld the “correct[ed] . . . information” sought. Plaintiffs have thus “fail[ed] to obtain information which must be publicly disclosed pursuant to” the IQA. *Akins*, 524 U.S. at 21; *see also Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016) (courts find standing where a plaintiff has been “deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it”); *Becker v. FEC*, 112 F. Supp. 2d 172, 180 (D. Mass. 2000) *aff’d* 230 F.3d 381 (1st Cir. 2000) (“[T]he injury-in-fact the Court found in *Akins* hinged on the denial of information which the statute required be made public.”). To be sure, Plaintiffs have received *some* information from the Agencies. But critically, Plaintiffs have not received a Report that meets the Agencies’ IQA obligations to make “appropriate” corrections or that includes the additional information Plaintiffs have requested about the Report. *See* AC ¶ 77a, b, d, f; 67 Fed. Reg. 8,459 (requiring appropriate context); *see also House v. Dep’t of Commerce*, 11 F. Supp. 2d 76, 85 (D.D.C. 1998), *appeal dismissed* 525 U.S. 316 (1999) (“receipt of the wrong information is no less of an injury than failure to receive any information at all”).

The Agencies contend that Plaintiffs lack “any legal right to information or [the Report’s]

correctness” based on the IQA. Mot. at 13 (quoting *Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006) and citing *Family Farm Alliance v. Salazar*, 749 F. Supp. 2d 1083, 1103 (E.D. Cal. 2010)). The argument is both wrong and irrelevant. It is wrong because, at the very least, the IQA requires agencies to adjudicate the rights of “affected persons” to “obtain[] . . . correction” and enforce the OMB Guidelines. *Id.* It is irrelevant because Plaintiffs have a legal right to bring their claims under the APA, as they do (AC ¶¶ 99-122), whatever the IQA provides: the APA allows suits for violations of law whether or not that law would independently grant the plaintiff a freestanding legal right to sue. *See, e.g., Scanwell Labs., Inc. v. Schaffer*, 424 F.2d 859, 866–67 (D.C. Cir. 1970) (plaintiff “adversely affected by [an] asserted misinterpretation of a statute” by an agency had standing to sue under the APA even though the violated statute was intended “for the protection of the government” and vested no independent legal right in plaintiff); *see also, e.g., Citizens for Responsibility & Ethics in Washington v. Trump*, ___ F.3d ___, 2019 WL 4383205, at *13 (2d Cir. Sept. 13, 2019) (whether a substantive provision of law was meant to benefit persons like the plaintiffs is “not relevant to whether the Plaintiffs have met the three elements that form the ‘irreducible constitutional minimum of standing’”).⁵ The *Salt Institute* case on which the government principally relies is thus inapposite because the court examined solely whether the IQA *alone* granted legal rights to the plaintiffs (not to mention a challenge to studies conducted by a third party, not the agency-defendant). 440 F.3d at 157.

2. *Plaintiffs have suffered the type of harm Congress sought to prevent by requiring disclosure*

Some courts have observed that “[i]n some instances . . . a plaintiff may need to allege

⁵ It is undisputed that Plaintiffs fall within the IQA’s zone of interests, but if the government did dispute that question it would bear only on Plaintiffs’ ability to bring an APA action, not their standing. *See Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 & n.4 (2014) (question whether plaintiff “falls within the class of plaintiffs whom Congress authorized to sue” concerns whether plaintiffs have a “cause of action,” not their standing); Mot. at 14 n.4 (asserting that these are “two separate questions”).

that nondisclosure has caused it to suffer the kind of harm from which Congress, in mandating disclosure, sought to protect individuals or organizations like it.” *Friends of Animals II*, 828 F.3d at 992. As the Supreme Court has instructed, it is sufficient that the agency has deprived the plaintiff of information whose disclosure is mandated by statute. *See id.*; *Akins*, 524 U.S. at 21–22. But if a heightened showing of “harm” were necessary Plaintiffs have made it.⁶

As discussed, the IQA was passed to guard against the harm caused by the dissemination of dubious information by federal agencies and, conversely, to improve the responsibility and accountability of federal agencies to the public. *Supra* at 5–6; *see United to Protect Democracy v. Presidential Advisory Comm’n on Election Integrity*, 288 F. Supp. 3d 99, 107 (D.D.C. 2017) (PRA was intended to allow “the public [to] . . . hold the government to account”). Plaintiffs are harmed by the receipt of inaccurate information that, if corrected, they would use to hold the government accountable and educate the public. In *United to Protect Democracy*, the court concluded that one of the plaintiffs suing here had informational standing under the PRA because it would have altered its advocacy strategies and used the requested information to “educate the public on [its] implications.” *Id.* The same is true here. *See* AC ¶ 72.

Moreover, the Agencies’ failure to comply with the IQA and OMB’s guidance has impaired Protect Democracy’s and the Brennan Center’s “missions to prevent the spread of disinformation, especially in the national security context,” and required them to “undertake material efforts to educate the public on the implications of the Report and to publicly correct its falsehoods and misstatements.” AC ¶ 72. *See Public Citizens*, 491 U.S. at 449 (standing to allow

⁶ In *Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium*, the court concluded that “informational harm alone is insufficient to establish standing.” 836 F. Supp. 45, 56 (D. Mass. 1993). But the Supreme Court subsequently clarified that a “Plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute,” *Akins*, 524 U.S. at 21–22, a holding the Supreme Court has recently reaffirmed, *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549–50 (2016) (in cases like *Akins*, “a plaintiff . . . need not allege any *additional* harm beyond the one Congress has identified”).

public interest group “to monitor its workings and participate more effectively in the judicial selection process” adequate in the informational standing context); *Friends of Animals v. Jewell*, 824 F.3d 1033, 1042 (D.C. Cir. 2016) (“*Friends of Animals I*”) (organization has standing to seek disclosure of information when information would allow it to “engage in related advocacy efforts”); *People for the Ethical Treatment of Animals v. U.S. Dep’t of Agric.*, 797 F.3d 1087, 1095 (D.C. Cir. 2015).

These efforts, as well as the “considerable resources” Protect Democracy and Brennan Center spent “investigating the Report’s claims in an attempt to understand the full breadth of its inaccuracy,” have collectively “drained resources that Protect Democracy and Brennan Center could have dedicated to their other advocacy efforts.” *See* AC ¶ 72. This expenditure to counteract the Agencies’ failure independently supports standing. *Havens Realty Corp.*, 455 U.S. 363 at 379 (“drain on the organization’s resources” sufficient to support informational standing); *Common Cause Ind. v. Lawson*, __ F.3d __, 2019 WL 4022177, at *5–6 (7th Cir. Aug. 27, 2019) (organization dedicated resources to combat resulting “voter confusion”); *Nat’l Women’s Law Ctr. v. OMB*, 358 F. Supp. 3d 66, 80 (D.D.C. 2019) (public interest group “us[ing] their resources to counteract the harm” of failure to disclose information).

3. *These injuries are not a generalized grievance*

The Agencies’ final argument against standing is that Plaintiffs have no “direct stake in the outcome of the litigation” and merely assert a “generalized grievance held by other members of the public.” Mot. at 13–14. That is wrong, as discussed above. The Agencies base this argument on only two cases that do not involve informational standing, one of which *affirmed* standing. *See Adams v. Watson*, 10 F.3d 915, 922 (1st Cir. 1993) (plaintiffs pleaded “competitor standing” based on future economic harm); *United States v. AVX Corp.*, 962 F.2d 108, 117 (1st Cir. 1992) (vague and conclusory allegations of environmental harm to the plaintiff’s members

insufficient to support standing). In fact, courts routinely reject this style of objection in the context of informational standing: any other result would render meaningless most, if not all, statutory disclosure requirements, including FOIA and the Federal Advisory Committees Act. *See Public Citizen*, 491 U.S. at 449 (“Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records.”). As the Sixth Circuit has explained, a demand for information “might be a ‘generalized grievance’ in the sense that up to the point they request it, the plaintiffs have an interest in the information shared by every other person, but it is not an abstract grievance in the sense condemned in *Akins*: the injury alleged is not that the defendants are merely failing to obey the law, it is that they are disobeying the law in failing to provide information that the plaintiffs desire and allegedly need.” *Am. Canoe Ass’n*, 389 F.3d at 545–47. This is all the more true in the context of the IQA, which already confines claimants to “affected persons.” *See supra* at 10.

The IQA did not require the Agencies to publish the Report—but once they did, they triggered their substantive obligations under the IQA as well as their obligation to supply an appropriate response to requests for correction. Pub. L. 106-554 § 515(b)(2); *United to Protect Democracy*, 288 F. Supp. 3d at 106 (statutory requirement that agencies publish an analysis of any proposed information collection before instituting one sufficient to support informational standing). The Agencies’ failure to produce the corrected and additional information requested in the Petition establishes Plaintiffs’ standing.

B. Plaintiffs Have Adequately Alleged Procedural Standing

Plaintiffs have standing for the independent reason that the Agencies have violated their statutory right to “seek and obtain” a correction to the Agencies’ Section 11 Report. In order to allege procedural standing, a Plaintiff must demonstrate both a procedural right as well as an

injury. *See Munoz-Mendoza v. Pierce*, 711 F.2d 421, 425–26 (1st Cir. 1983) (Breyer, J.).

Nevertheless, the usual Article III requirement that the concrete harm be “immediate” is relaxed, and so all Plaintiffs must show is that the violated procedure was “designed to protect some threatened concrete interest personal to Plaintiffs.” *See Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 26–27 (1st Cir. 2007) (quoting *Lujan*, 504 U.S. at 572–73 nn.7–8).

Plaintiffs have alleged that Agencies have violated Plaintiffs’ procedural right to correction of the Report. The IQA requires that information disseminated by federal agencies satisfy the standards of objectivity, utility, and integrity promulgated by OMB, and that agencies establish administrative mechanisms allowing “affected persons” to “seek *and obtain* correction of information maintained and disseminated by the agency that does not comply with” those Guidelines. *See* Pub. L. 106-554 § 515(b)(2)(B) (emphasis added). Again, the Agencies do not dispute that Plaintiffs are “affected persons” who followed the appropriate administrative procedures. AC ¶ 70. By refusing to correct the Report, the Agencies have limited Plaintiffs’ procedural right to not only “seek,” but also to “obtain” correction.

Plaintiffs have suffered concrete harm from the Agencies’ unilateral denial of a congressionally-mandated remedy to an “affected persons” who filed a proper administrative proceeding and therefore had a right to obtain relief. *Supra* at 9–11; Pub. L. 106-554 § 515(b)(2)(B); *see Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1042–43 (9th Cir. 2017) (recognizing courts partially defer to Congress’ judgment in light of its “role in elevating concrete, de facto injuries previously inadequate in law “to the status of legally cognizable injuries”). In the absence of correction by the Agencies, Plaintiffs must now expend their own resources to correct the public record as best as they possibly can. *See supra* at 11–13.

C. Causation and Redressability

The Agencies briefly suggest that Plaintiffs have not shown redressability or traceability.

Mot. at 13; *but cf. Lujan*, 504 U.S. at 572 n.7 (a plaintiff “who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability”). But as explained *supra*, Plaintiffs’ injuries stem entirely from the Agencies’ failure to correct their false Report. With a corrected Report, Plaintiffs would no longer need to educate the public on its falsity or expend resources to analyze its flaws. Plaintiffs’ injury is plainly traceable to the Agencies’ denial of the Petition and therefore redressable by a court order vacating that denial and remanding the case back to the Agencies to reconsider an appropriate response. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007) (redressability is “some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant”); *Collins v. Mnuchin*, ___ F.3d ___, 2019 WL 4233612, at *12 (5th Cir. Sept. 6, 2019) (*en banc*) (finding causation and redressability even if the agency’s decision would have been the same but for the claimed violation).

III. The APA Provides for Judicial Review of the Agencies’ Denial of Plaintiffs’ Petition

“The Administrative Procedure Act embodies a basic presumption of judicial review, and instructs reviewing courts to set aside agency action that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2567 (2019) (internal citation omitted) (quoting 5 U.S.C. § 706(2)(A)). The APA requires the Court to set aside the Agencies’ denial of Plaintiffs’ Petition.

The Agencies do not argue otherwise. Indeed, the Agencies only weakly protest the allegations that the Report contains false information, doubling down on their claimed distinction between “false” information and mere “editorial errors.” Mot. at 11 n.3 (“Defendants openly admitted . . . that certain statistics regarding gender-based violence were due to editorial errors. Nowhere, however, do Defendants admit that the information was misleading and false.”). Plaintiffs are at a loss to understand how something can be both an “error”—editorial or

otherwise—and true. Nothing in the IQA statute or guidance suggests that agencies can only *intentionally* violate the IQA. Tellingly, the Agencies do not actually defend this excuse under the IQA standards, and for good reason; even inadvertent error (whether from sloppy editing, lackadaisical factual investigation, or honest misunderstanding) is obviously not “accurate,” “reliable,” or “useful.” *See* 67 Fed. Reg. 8,459–60. Instead, the Agencies argue that the Court can never even ask if their actions were lawful because (i) their adjudication of the Petition is not “final agency action”, and (ii) the IQA itself prevents the Court’s review. Both arguments fail.

A. The Denial of the Petition Is Final Agency Action.

The APA permits judicial review of “final agency action.” 5 U.S.C. § 704. To evaluate whether an agency has taken action within the meaning of this language, courts look to whether the agency has “determined” a party’s “rights or obligations,” or otherwise made a decision “from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

Here, the IQA gives Plaintiffs the right to “seek and obtain” correction when an agency disseminates information that violates the OMB Guidelines. The Agencies’ denial was an adjudication of Plaintiffs’ right to obtain that information and forever extinguishes their ability to obtain it. *Hyatt v. Office of Mgmt. & Budget*, 908 F.3d 1165, 1172 (9th Cir. 2018) (denial of plaintiff’s petition under the PRA for a declaration that plaintiff was not obligated to provide certain information to OMB was final agency action). It is therefore final agency action and appropriate for adjudication under the APA.

At the very least, the Agencies have determined their *own* obligations under the APA, which is enough to qualify as final agency action. In *Doe v. Tenenbaum*, the court rejected the argument that an agency’s decision to publish a report must determine the *plaintiffs’* legal rights in order to constitute agency action; where the agency was legally bound to adjudicate whether a report contained a material inaccuracy, it was sufficient that the decision determined the

agency's obligations with respect to publication. 127 F. Supp. 3d 426, 461 (D. Md. 2012). The test, properly understood, captures any action “by which rights or obligations have been determined.” *Id.* In *Doe*, as here, the agency published a report “mark[ing] the consummation of an adversarial process,” and the agency made a “determination” that the report satisfied the specified legal requirements. *Id.* at 462. Because the agency’s adjudication “determined the [agency’s] right to prevent publication of . . . misleading and detrimental data,” it was final agency action. *Id.* at 463; *accord Conservation Law Found., Inc. v. Jackson*, 964 F. Supp. 2d 152, 161 (D. Mass. 2013) (final agency action when adjudication determined agency could not provide funding to plaintiff).

The Agencies’ argument that the denial of an IQA petition does not affect Plaintiffs’ legal rights recycles the contention that the IQA “does not create any legal right to information or its correctness.” Mot. at 21 (quoting *Salt Institute*, 440 F.3d at 159). The Agencies cite several cases finding that because the IQA vests no legal rights in a petitioner, no “legal consequences flow” from a denial of the petition. Mot. at 21 (citing *Single Stick, Inc. v. Johanns*, 601 F. Supp. 2d 307, 317 (D.D.C. 2009) and *Am. for Safe Access v. HHS*, 2007 WL 2141289, at *4 (N.D. Cal. July 24, 2007)). This conclusion is no more correct here than in the standing context.

First, the Agencies’ argument again improperly conditions an APA action on the independent enforceability of a statute. *See supra* at 11; *see Cousins v. Sec’y of the U.S. Dep’t of Transp.*, 880 F.2d 603, 606 (1st Cir. 1989) (“The general provisions for judicial review of agency action, as embodied in the APA” mean “when a plaintiff seeks to enforce a federal statute against a federal regulatory agency, there is normally no need for an implied private right of action.”). Courts routinely allow plaintiffs to enforce statutes for which there is no independent judicial review provision. *See, e.g., Bennett*, 520 U.S. at 176 (plaintiffs could sue under the APA to

enforce Endangered Species Act provision when that Act’s own judicial review provision did not apply).

Second, neither the Agencies nor any case on which the Agencies rely has analyzed whether the outcome of the adjudication affects the *Agencies’* legal rights or obligations. *See supra* at 17–18. A Court may review whether the Agencies appropriately determined their own legal obligations under the IQA and OMB Guidelines, including determination that they are not obliged to issue a corrected Report. *See Sig Sauer, Inc. v. Jones*, 133 F. Supp. 3d 364, 369 n.6 (D.N.H. 2015), *aff’d sub nom. Sig Sauer, Inc. v. Brandon*, 826 F.3d 598, 600 n.1 (1st Cir. 2016) (“Informal adjudication can qualify as final agency action if the agency has completed its decision making and no other adequate judicial remedy exists.”).⁷

B. The IQA Does Not Frustrate This Court’s Review

It is well-settled that “Congress rarely intends to prevent courts from enforcing its directives to federal agencies” and that courts “appl[y] a strong presumption’ favoring judicial review of administrative action.” *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1651 (2015); *accord Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967) (“The APA’s generous review provisions, must be given a ‘hospitable’ interpretation.”). The Agencies nevertheless argue that the IQA does not allow for review under the APA because (i) the IQA itself omits provisions for

⁷ Plaintiffs recognize that in *Muslim Advocates v. DOJ*, the Magistrate Judge considered the Agencies’ denial of a different IQA petition involving the Report and found a lack of final agency action. 2019 WL 3254230, at *11 (N.D. Cal. July 19, 2019). There, however, the court did not evaluate whether the Agencies’ adjudication determined the *Agencies’* legal rights and obligations—a sufficiently final action, as discussed in the text above. And Plaintiffs respectfully submit that the *Muslim Advocates* court’s analysis of those plaintiffs’ legal rights was incorrect. *See id.* at *10. Indeed, as that court itself acknowledged, no court of appeals has embraced the rationale that an agency IQA adjudication is not final agency action; rather, reviewing courts have elected to affirm on different grounds. *Id.* at *9 (citing *Harkonen v. DOJ*, 800 F.3d 1143, 1149–51 (9th Cir. 2015); *Prime Time Int’l Co. v. Vilsack*, 599 F.3d 678, 685 (D.C. Cir. 2010)). Indeed, those courts’ application of *Chevron* to the OMB Guidelines reinforces that the Guidelines have an “actual legal effect” such that agency adjudications under the Guidelines constitute reviewable agency action. *See Guedes v. ATF*, 920 F.3d 1, 17–18 (D.C. Cir. 2019) cert. pet. docketed No. 19-296 (Sept. 4, 2019) (noting whether rule is legislative “centrally informs the applicability of *Chevron*”); *Cal. Communities Against Toxics v. EPA*, __ F.3d __, 2019 WL 3917540 (D.C. Cir. Aug. 20, 2019) (legislative rules necessarily final agency action).

review, and (ii) the IQA commits agency adjudications to agency discretion.

1. The IQA does not impliedly preclude review here

The Agencies first argue that because the IQA creates an administrative mechanism to challenge agency publications but is silent about judicial review, their administrative determinations are unreviewable by a court. Mot. at 16–17 (quoting 5 U.S.C. § 701(a)(1)). As the Agencies concede, however, courts require “clear and convincing evidence” that Congress intended to insulate agency action from judicial review. *Jordan Hosp., Inc. v. Shalala*, 276 F.3d 72, 76 (1st Cir. 2002); *Centro Presente v. DHS*, 332 F. Supp. 3d 393, 405 (D. Mass. 2018) (requiring “reliable indicator” to preclude review in either “specific” statutory language or legislative history or “detail of the legislative scheme”). There is no such evidence here.

Silence is not enough to extinguish judicial review. *Sierra Club v. Peterson*, 705 F.2d 1475, 1478–79 (9th Cir. 1983) (“Mere silence in the statute should not be read as precluding judicial review under the APA.”); *High Country Citizens All. v. Clarke*, 454 F.3d 1177, 1199 (10th Cir. 2006) (similar); cf. *Dep’t of Transp. & Dev. of La. v. Beaird-Poulan, Inc.*, 449 U.S. 971, 973 (1980) (mem.) (congressional “silence may not preclude federal judicial review of federal agency decision”). In creating a presumption of review under the APA, Congress ensured that it need not expressly legislate judicial review provisions each time it provides an administrative mechanism. See *Cousins*, 880 F.2d at 606 (APA “supplant[ed] a variety of pre-existing methods for obtaining review that . . . sometimes hindered the efforts of injured persons to obtain relief.”). Courts accordingly review agency adjudications in cases even absent judicial review provisions in the authorizing statute. See *Hill v. Norton*, 275 F.3d 98, 103 (D.C. Cir. 2001) (reviewing agency adjudication under the APA when statute did not “provide a process for judicial review”); *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1205 (9th Cir. 2004) (same).

The Agencies principally rely on *Block v. Community Nutrition Institute*, 467 U.S. 340

(1984), which they misread to stand for the proposition that in “complex” regulatory schemes, any time Congress “omi[ts]” an “express” judicial review provision, it insulates agency adjudication from review. Mot. at 17. There, however, a “complex” regulatory scheme explicitly authorized just one class of stakeholders to pursue judicial review, and the Court did not feel free to bypass that choice through the APA. *Block*, 467 U.S. at 346. The Court expressly limited its reasoning to “complex scheme[s] of this type.” *Id.* at 347. There is no analogous partial provision here. The IQA broadly grants “affected persons” the right to be involved in the agency’s process, *see supra* at 10, and is silent on judicial review for all parties. The APA accordingly applies.

2. *Judicially manageable standards are available to review IQA decisions*

Finally, the Agencies argue that even if the IQA does not expressly preclude review, Congress intended to impliedly preclude judicial review because no judicially manageable standards can be discerned.⁸ *See* Mot. at 18 n.5; *see also Muslim Advocates*, 2019 WL 3254230, at *9. But cases inimical to judicial review “are few,” and “typically involve areas where the very act of reviewing may impede the agency’s ability to carry out its statutory functions,” *NAACP v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 157 (1st Cir. 1987) (Breyer, C.J.)—the “categories of administrative decisions that courts traditionally have regarded as ‘committed to agency discretion.’” *Dep’t of Commerce*, 139 S. Ct. at 2568 (noting application in context of decision to decline enforcement and terminate employee for national security reasons). Agencies may have *some* discretion in how they ascertain and present factual information, but their discretion is cabined by the IQA.

⁸ The Agencies frame their argument as though the Complaint challenged only the *timeliness* of their response, rather than their substantive compliance with the IQA. *See* Mot. at 18 & n.5. This characterization apparently confuses the initial Complaint for the Amended Complaint. The Agencies’ mistake makes their reliance on *Family Farm Alliance*—involving timing of an IQA response, 749 F. Supp. 2d at 1103—irrelevant.

The APA simply requires a “meaningful statutory standard . . . against which to judge the exercise of agency discretion.” *Watervale Marine Co. v. DHS*, 55 F. Supp. 3d 124, 138 (D.D.C. 2014), *aff’d* 807 F.3d 325 (D.C. Cir. 2015). The plain text of the IQA provides this standard: an agency’s review must “allow affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines” that OMB promulgated to “ensur[e] and maximiz[e] the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.” Pub. L. 106-554 § 515(a), (b)(2)(B). The Guidelines then direct an agency to take corrective measures that are “appropriate for the nature and timeliness of the information involved.” 67 Fed. Reg. 8,458. The statute thus supplies a two-step test to determine an agency’s IQA compliance, in which a court should address first the agency’s application of the IQA’s substantive standards, and second the remedy it has provided in its IQA adjudication.

First, a court reviews, under the § 706 standard of review, the agency’s determination that the “information maintained and disseminated by the agency . . . compl[ies] with the guidelines issued under subsection (a)” effectuating the statutory standards of “quality, objectivity, utility, and integrity.” Pub. L. 106-554 § 515(a), (b)(2)(B). *See Hauod v. Ashcroft*, 350 F.3d 201, 206 (1st Cir. 2003) (agency regulations can “provide[] more than enough ‘law’ by which a court could review” agency’s decision); *King v. Office for Civil Rights of U.S. Dep’t of Health & Human Servs.*, 573 F. Supp. 2d 425, 428–29 (D. Mass. 2008) (agency regulations requiring “prompt investigation” when a complaint is filed judicially manageable); *see also Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) (“Judicially manageable standards may be found in formal and informal policy statements and regulations as well as in statutes.”). The guidelines define those terms in a way that “establish[es] a clear meaning so that both the agency

and the public can readily judge whether a particular type of information to be disseminated does or does not meet these attributes.” 67 Fed. Reg. 8,458; *see supra* at 7. If the OMB Guidelines are specific enough for the agency and the public to “readily judge” whether certain information meets the IQA’s information quality standards, they are surely enough for a judge to, as well. *See NAACP*, 817 F.2d at 158 (statutory instruction to “administer” agency program “in a manner affirmatively to further the policies” of “fair housing” judicially administrable).

The APA does not require courts to intrude on policy judgments or matters on which the agency properly exercises its discretion. For one thing, the IQA applies only to disseminations of factual information. *See* 67 Fed. Reg. 8,460 (defining “information” as “any communication or representation of knowledge such as facts or data”); 2019 OMB Memo at 10 (noting “agencies should not opine on . . . the agency’s policy position” in IQA response). For another, the Court can fairly evaluate whether legal constructions adopted by the Agencies are contrary to law. *See* 5 U.S.C. § 706. The Court can then analyze the Agencies’ application of the IQA as it would any other review of agency action: by asking whether their actions are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Sig Sauer*, 826 F.3d at 601.

Courts have abundant competence to apply this familiar standard: “A decision is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Craker v. DEA*, 714 F.3d 17, 26 (1st Cir. 2013). And while the APA does not authorize courts to re-weigh an agency’s factual determinations, *see Nw. Bypass Grp. v. U.S. Army Corps of Eng’rs*, 470 F. Supp. 2d 30, 39 (D.N.H. 2007) (rejecting application of “substantial evidence” test to informal adjudication),

some factual determinations are so patently unsupported or contrary to the evidence that they are themselves arbitrary and capricious, *see Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984) (Scalia, J.) (factual judgment “arbitrary” if “supported only by evidence that is not substantial in the APA sense”).⁹

The Court need look no further than the specific challenges raised in this lawsuit to conclude that reviewing the Agencies’ IQA adjudication lies in the heartland of APA review. For example, the Amended Complaint asks this Court to review whether the Agencies’ explanations “runs counter to the evidence before” it. *Craker*, 714 F.3d at 26; *see* AC ¶ 97 (Report misstates the number of forced marriages). It asserts that the Agencies simply ignored certain of Plaintiffs’ objections to the Report. *See Int’l Fabricare Inst. v. EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992) (agency’s action may be vacated where it has “failed to respond to specific challenges that are sufficiently central to its decision”); AC ¶ 97 (identifying issues to which the Agencies failed to respond in their denial of the Petition). And it asks whether the Agencies failed to “consider the relevant factors,” including applying an incorrect legal standard, *see Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 371 (2018) (“[F]ederal courts routinely assess . . . whether a decision was based on a consideration of the relevant factors.”); *Augat, Inc. v. Tabor*, 719 F. Supp. 1158, 1160 (D. Mass. 1989) (vacating action when legal premise was “not a correct statement of the law”); AC ¶ 68 (noting adjudication failed to account for fact that the Report was “highly influential” under OMB Guidelines). At bare minimum, any proper response to the Petitions must acknowledge these deficiencies. *See* 2019 OMB Memo at

⁹ The Agencies ask this Court to hold that Congress implicitly meant to completely insulate all agency information disseminations from review even in the face of deliberate falsification, and even if the information is as essential as the census, 13 U.S.C. § 41, employment data, 29 U.S.C. §§ 2, 491-2, criminal justice statistics, 34 U.S.C. § 10132, or weather forecasts, 15 U.S.C. § 313. This interpretation cannot be squared with Congress’ goals in the IQA and its enactment of a procedure for enforcing those goals.

10 (requiring “a point-by-point response to any data quality arguments”).

Second, the IQA requires that an agency allow an “affected person[] to seek and obtain correction” of the noncompliant information. Pub. L. 106-554 § 515(b)(2)(B). OMB has interpreted this mandate to allow agencies some discretion; agencies “are required to undertake only the degree of correction that they conclude is appropriate for the nature and timeliness of the information involved.” 67 Fed. Reg. 8,458. This, too, provides the Court with a judicially manageable standard—the agency must account for the propriety of its decision based on the “nature and timeliness” of the information. As then-Judge Breyer explained, “the fact that an agency enjoys broad discretionary powers does not mean judicial review is forbidden.” *Dugan v. Ramsay*, 727 F.2d 192, 195 (1st Cir. 1984). Courts have found review under laws giving considerably more discretion to an agency judicially manageable. *See Ward v. Skinner*, 943 F.2d 157, 159–60 (1st Cir. 1991) (statute providing agency may grant waiver “if the Secretary determines that such waiver is not contrary to the public interest and is consistent with the safe operation of motor vehicles”); *Barlow v. Collins*, 397 U.S. 159, 165 (1970) (statute authorizing agency to promulgate regulations it “may deem proper”); *see also Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1223 (D.C. Cir. 1993) (statue permitting exceptions “as the Secretary deems appropriate”); *State of Iowa ex rel. Miller v. Block*, 771 F.2d 347, 349 (8th Cir. 1985) (statute requiring action “if the Secretary determines” certain factual predicates).

In *Muslim Advocates*, the court suggested that the OMB Guidelines’ use of “discretionary language” for the requisite correction means that the Guidelines “provide[] for complete agency discretion” in adjudicating IQA petitions. 2019 WL 3254230, at *8. With respect, that conclusion does not follow from the premise. It is well established that a grant of discretion does not altogether immunize agency action from judicial review. *See, e.g., Dep’t of Commerce*, 139

S. Ct. at 2577 (reviewing statute providing agency could take census “in such form and content as [it] may determine” for compliance with statute and abuse of discretion); 5 U.S.C. § 706(2)(A) (permitting review for “abuse of discretion”). At minimum, the Agencies must adequately explain how the “nature and timeliness” of the relevant information makes any correction inappropriate. *See Mach Mining* 135 S. Ct. at 1651 (requirement that agency “shall endeavor” to eliminate illegality through “methods of conference, conciliation, and persuasion” provided judicially manageable standards for review because agency could not “decline[] to make any attempt to conciliate a claim”); *Texas v. United States*, 809 F.3d 134, 168 (5th Cir. 2015) (“The mere fact that a statute grants broad discretion to an agency does not render the agency’s decisions completely unreviewable under the ‘committed to agency discretion by law’ exception unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised.”). Indeed, the official over whose signature the OMB Guidelines were promulgated advised shortly thereafter that courts should enforce the IQA at least in “cases of egregious agency mismanagement.” *See* John D. Graham, Office of Information and Regulatory Affairs Administrator, OMB’s Role in Overseeing Information Quality, Remarks to Public Workshop on Information-Quality Guideline (Mar. 21, 2002).¹⁰

The Petition here is, again, a case in point. The Agencies have admitted at least one outright error, and conceded that certain of the Petition’s critiques were “well-taken” and that other corrections would “promote the perception of objectivity” required by the IQA—but nevertheless have denied the request for correction. *See* AC ¶ 94. The Agencies never bothered to explain why correction would not be “appropriate” under OMB’s criteria or otherwise. And here, where the Agencies are obliged to conduct and in fact undertook an informal adjudication

¹⁰ https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/info-reg/info-quality_march21.pdf.

and appeal, recognizing that a court may review that agency action within the boundaries of § 706 obviously would not “impede the agency’s ability to carry out its statutory functions.” *See NAACP*, 817 F.2d at 157.

The Agencies flouted their responsibilities under the IQA when they issued and refused to correct, augment, or explain a Report that misleads the public. They have rendered the right Congress granted to petitioners to “obtain correction” illusory, and this Court is able to determine whether that is “an abuse of discretion,” “contrary to law,” or a failure to “observ[e] . . . procedure required by law.”

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court deny in its entirety the Agencies’ Motion to Dismiss.

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to any non-registered participants by first-class mail, postage prepaid, on September 13, 2019.

/s/ Meaghan VerGow
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